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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 994

SEYMOUR POLLACK,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No.

SEYMOUR POLLACK,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the Decision and Judgment of the United States Court of Appeals for the Fifth Circuit entered on October 1, 1969.

THE OPINION BELOW

The Opinion of the United States Court of Appeals for the Fifth Circuit is printed in Appendix A *infra*, at p. 1(a), and has not been reported.

JURISDICTION

The Court of Appeals filed its Opinion and Judgment on October 1, 1969 and denied petitioner's Petition for Rehearing on October 28, 1969. The Court of Appeals stayed its mandate until November 27, 1969. This Court on November 21, 1969 extended the time for filing this petition to and including December 27, 1969. The jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

Amendments V and VI to the Constitution, the applicable provisions of 18 U.S.C., Secs. 371, 1341, 1343 and 2314, 15 U.S.C., Sec. 77(q)(a), Rules 34 and 47 of the Federal Rules of Appellate Procedure and Local Rule 18 of the United States Court of Appeals for the Fifth Circuit are printed in Appendix B to this Petition.

STATEMENT OF THE CASE

On June 6, 1967, Petitioner was indicted in the United States District Court for the Northern District of Alabama. The indictment covers twenty five pages of the record (R. 1-25)[1], contains eight Counts, charges a vast conspiracy operating in several States violating 18 U.S.C., Sec. 371; violations of 18 U.S.C., Sec. 1341 (mail fraud); 15 U.S.C., Sec. 77(q)(a) (sale of securities in interstate commerce); 18 U.S.C., Sec. 1343 (use of interstate wire communication facilities); and 18 U.S.C., Sec. 2314 (interstate transportation of securities).

The indictment named as defendants J. Ernie Gaskin and Samuel Palmer Keith, Jr. Also named as a conspirator was William L. Delong, but not indicted because deceased. Counts 2 through 8 charge substantive offenses on the theory that

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[1] "R" refers to the Transcript of Record filed with this Court.

each was part of the vast conspiracy described in Count 1, covering the period August 26, 1965 through March 8, 1966, having for its purpose fraudulently obtaining monies, securities and other assets of the United Security Life Insurance Company. All of the financial transactions involved and all of the transactions charged as substantive offenses in Counts 2 through 8 are charged in Count 1 to be overt acts to carry out the objects of the conspiracy (R. 11).

All defendants pleaded not guilty. Petitioner's trial was separate and he was tried later because of illness. In the earlier trial, Keith was found not guilty and Gaskin was found guilty on Counts 1 and 3 through 8. Gaskin was sentenced to three years, appealed from the judgment of conviction and the District Court granted bail on appeal. That appeal is pending.

The jury found Petitioner guilty on all eight Counts. Petitioner was sentenced to five years on each Count, to run concurrently. Petitioner timely filed a Notice of Appeal. The District Court granted bail on appeal.

On September 23, 1969, after Petitioner and Respondent had filed their briefs on appeal, the Court of Appeals transferred the appeal to the Summary Calendar for disposition under Rule 18 of that Court and in a summary proceeding disposed of the appeal without argument. Petitioner timely filed a Petition for Rehearing, which petition was likewise disposed of in summary fashion without argument by the court below by Order entered on October 28, 1969. The court below stayed the Mandate pending the filing of an application for Writ of Certiorari to and including November 27, 1969. This Court on motion of Petitioner entered an Order on November 21, 1969, extending the time for filing this Petition for a Writ of Certiorari to and including December 27, 1969.

QUESTIONS PRESENTED

1. Whether Petitioner is being deprived of his liberty without due process of law, contrary to the Fifth Amendment to the Constitution of the United States, because:

(a) the Court below adopted, unlawfully and in violation of the Constitution of the United States, the decisions and Federal Rules of Appellate Procedure of this Court, its Rule 18, providing for summary disposition of Petitioner's appeal without oral argument; and

(b) if Rule 18 were not to be held unconstitutional or illegal by this Court, the Court of Appeals' *sua sponte* transfer of Petitioner's appeal to the summary calendar and its summary disposition of the appeal without oral argument, were arbitrary and capricious and constitute a denial of due process of law to Petitioner.

2. Whether Petitioner was deprived of his constitutional rights to a fair trial and is being deprived of his liberty without due process of law, contrary to the Fifth and Sixth Amendments of the Constitution of the United States in a criminal case where the District Court committed such a great number of plain prejudicial errors (including, but not limited to the following) as to completely invalidate the trial proceedings, to wit:

(a) permitting Petitioner to go to trial on a 25-page indictment charging seven unrelated substantive offenses under distinct and unrelated statutes;

(b) permitting evidence of a conviction of an alleged co-conspirator in order to infer Petitioner's guilt under the indictment, although that earlier conviction had not been finally affirmed;

(c) admitting evidence of the suicide of another alleged co-conspirator, to infer an admission of guilt by that deceased co-conspirator, although the prosecution knew or should have known that the reasons for the suicide were personal involvement of an amorous nature;

(d) permitting the prosecution to withhold evidence which would have tended to exonerate Petitioner;

(e) permitting in evidence and the using of enlarged, inflammatory and hearsay exhibits prepared by a Government investigator, which exhibits were not based upon the evidence;

(f) denying Petitioner's motion for a mistrial, in the light of prejudicial newspaper publicity although it had been clearly shown that the jury had access to such publicity inside the jury room, and prior to the verdict; and

(g) denying Petitioner's motion for a directed verdict of Not Guilty at the conclusion of the prosecution's evidence.

REASONS FOR GRANTING THE WRIT

Several of the reasons governing review on Certiorari by this Court are present in this case. The Court below has rendered a summary decision without argument, in conflict with the decisions and the Federal Rules of Appellate Procedure of this Court, earlier decisions of the Court below, other Circuit Courts of Appeal and with authoritative decisions in the State Courts, and, in erroneously affirming the actions of the District Court, deprived petitioner of a fair and impartial trial and of the right not to be deprived of his liberty without due process of law, contrary to Amendments V and VI to the Constitution of the United States.

The Court of Appeals in adopting its Rule 18 and in barring oral argument and providing for a summary hearing, has raised an important question of Federal law which has not been, but should be, settled by this Court.

The decisions below have so far departed from the accepted and usual course of judicial proceedings and the Court of Appeals has sanctioned such a departure by the District Court as to call for an exercise of this Court's power of supervision.

I.

RULE 18 PERMITTING SUMMARY PROCEEDINGS WITHOUT ORAL ARGUMENT IS UNCONSTITUTIONAL AND IS CONTRARY TO THE FEDERAL RULES OF APPELLATE PROCEDURE OF THIS COURT

Rule 18[2] of the Court below provides for a Summary Calendar and authorizes the Court, *sua sponte*, to consider cases without oral argument, all without an appellant's consent. On September 23, 1969 the Court below *sua sponte* placed Petitioner's appeal on the Summary Calendar, barred oral argument and decided the appeal in a summary proceeding. The right to be heard orally in open court is a part of due process of law. We contend oral argument could not be waived except by consent of the parties to an appeal. Summary proceedings, like those below, we submit, are a denial of due process of law guaranteed by the Fifth Amendment to the Constitution.

> *Washington v. Texas*, 388 U.S. 14, 87 S. Ct. 1920;
> *In Re Green*, 369 U.S. 689, 82 S. Ct. 747;
> *In Re Oliver*, 333 U.S. 257, 82 S. Ct. 499;
> *Cole v. Arkansas*, 333 U.S. 196, 68 S. Ct. 514;
> *Powell v. Alabama*, 287 U.S. 45, 53 S. Ct. 55.

In enacting Rule 18 and in deciding the appeal below without oral argument and in a summary manner, the Court below has raised and decided an important question of Federal law which has not been but should be settled by this Court. As this Court said in *Powell v. State of Alabama*, 287 U.S. 45, 68, 53 S. Ct. 55, 64, "A Court must hear before it condemns."

> "A person's right to reasonable notice of a charge against him and an opportunity to be heard in his defense—a right to his day in Court—are basic to our system of jurisprudence." *Washington v. State of Texas*, 388 U.S. 14, 18, 87 S. Ct. 1920, 1923.

Oral argument in Courts of Appeal is now controlled by the Federal Rules of Appellate Procedure of this Court.

[2] App. B, p. B4.

Rule 34 of those Rules provides for oral argument of appeals, fixes the time for argument and further provides that argument can be dispensed with and the case submitted on Briefs only "by agreement of the parties." (App. B, p. B3).

Rule 47 of the Appellate Rules permits local rules to be adopted but such rules must not be inconsistent with the rules of this Court. (App. B, p. B4).

Rule 18 of the Court below, we submit, is illegal in that it is inconsistent with Rules 34 and 47 F.R.A.P. and constitutes an arbitrary and capricious disposition of Petitioner's appeal without his consent and contrary to law. Rule 18 and the decision of the Court below, and earlier decisions of that Court under Rule 18, are in conflict with the decisions of this Court, the Federal Rules of Appellate Practice, and these actions of the Court below have so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

Where questions are presented on appeal not so patently frivolous as to require the dismissal of the appeal, they cannot be disposed of in a summary fashion and have to be briefed and argued.

Coppedge v. United States, 369 U.S. 438, 453; 82 S. Ct. 917, 925 (1962). In *Coppedge* this Court held (p. 453, 925):

> "Contrary to the Government's assertions here that petitioner has already received what amounts to plenary review of the conviction following his second trial, we hold petitioner has not yet received the benefits of presenting either oral argument or full briefs on the merits of his claims to the court first charged with the supervision of the trial court. *****We only hold that taken as a whole, petitioner's various claims cannot justify the summary disposition of his case ordered below."

In *Rodriguez v. United States*, 89 S. Ct. 1715 (June 2, 1969) this Court held that an appeal from a district court's

judgment of conviction in a criminal case is a matter of right, stating through Justice Marshall (p. 1717):

> "Those whose right to appeal has been frustrated should be treated exactly like any other appellant's, they should not be given an additional hurdle to clear just because their rights were violated at some earlier stage of the proceedings".

II.

PETITIONER IS BEING DEPRIVED OF HIS LIBERTY WITHOUT DUE PROCESS OF LAW BECAUSE OF PLAIN PREJUDICIAL ERRORS COMMITTED IN THE DISTRICT COURT

Petitioner was required to go to trial on a twenty-five page indictment, charging a vast conspiracy over several states and seven substantive offenses under distinct and unrelated statutes, i.e., mail fraud, sale of securities in interstate commerce, illegal use of interstate wire facilities and interstate transportation of securities. Count 1 charges a vast conspiracy during the period August 26, 1965 through March 8, 1966 to defraud the United Security Life Insurance Company. The substantive offenses in Counts 2 through 8 are charged as being overt acts (R. 11).

Respondent's proof was bottomed on the charge in the indictment that 75,000 shares of stock of Fifth Avenue Industries and 75,000 shares of stock of General Holding Corporation transferred to United had "no value" (R. 4). In stock market transactions, the values of unlisted stocks are shown on what are termed brokers' "pink sheets", showing prices asked and demanded. In the cross-examination of prosecution witness Latsis, an employee of United, the existence of these "pink sheets" and the quotes on them was shown (R. 166-173). These "pink sheets" obviously were in the possession of the prosecution as the Securities and Exchange Commission conducted this investigation and has all such stock records. The deliberate or negligent failure of the prosecution to produce these "pink sheets" on the

issue of "no value" of these stocks is contrary to Canon of Professional Ethics 5, which requires the production of all evidence on an issue in order "that justice is done".[3] The failure to produce this vital evidence on value which would have established that these 150,000 shares of stock had values of from $3.00 to $3.75 or more per share, is contrary to *Napue v. People of the State of Illinois*, 360 U.S. 264, 79 S. Ct. 1173 (1959); *Giles v. State of Maryland*, 386 U.S. 69, 87 S. Ct. 793 (1967); *Clancy v. United States*, 365 U.S. 312, 81 S. Ct. 645 (1961); *United States v. Consolidated Laundries Corporation*, 291 F.2d 563, C.A. 2, (1961); and *United States v. Miller*, 411 F.2d 825, C.A. 2, (1969).

Without proof of the existence of the conspiracy charged, evidence concerning the transactions described in Counts 2 through 8 (all of which were handled in ordinary and businesslike manner) was admitted subject to being connected up with Petitioner pursuant to the conspiracy. The conspiracy charged was not established by competent evidence *aliunde*. The District Court permitted the "unrelated" proof concerning the substantive offenses (overt acts) to be received in evidence without being connected to Petitioner and the conspiracy and the court below considered that evidence sufficient to establish the conspiracy charge and the substantive offenses. Proof *aliunde* establishing conspiracy and connecting the defendant with it is necessary to a conviction. *Glasser v. United States*, 315 U.S. 60, 74; 62 S. Ct. 457, 467. In *Glasser*, this Court held evidence like acts of co-conspirators, is admissible "only if there is proof *aliunde*" of the conspiracy. No such proof exists in this case.

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[3]Canon 5 of the American Bar Association in applicable part reads:

> " * * * The primary duty of a lawyer engaged in public prosecution is not to convict, but to see that justice is done. The suppression of facts or the secreting of witnesses capable of establishing the innocence of the accused is highly reprehensible."

The conspiracy charged in the indictment had to be formed prior to, and by August 26, 1965. The indictment lists overt acts designated A through O (R. 11-15). The first overt act done pursuant to the conspiracy A occurred on August 26, 1965 at Birmingham, Alabama (R. 11). The record is devoid of any evidence establishing that conspiracy by August 26, 1965. At that date the so-called conspirators, Gaskin and Pollack, had not met and did not even know Keith and DeLong. The District Court permitted all evidence concerning the overt acts, which comprises the substantive offenses in Counts 2 through 8, to be received in evidence subject to being connected up. This was never done. Overt acts and means are not available to prove the conspiracy itself. Moreover, the Government's exhibits, up to Exhibit 162, while identified and received in evidence and briefly described and quoted from in part in the testimony, were never circulated among the jury and were not sent into the jury room. Thus, the "damning" evidence before the jury other than the characterization and excerpts from the exhibits dealing with overt acts, was evidence that Gaskin had been convicted under the same indictment in a prior trial, and that DeLong, another co-conspirator, had committed suicide, together with United States' Exhibits 162, 163 and 164. These three exhibits were blown-up; hearsay cash-flow charts prepared by a Government investigator, and measured up to three and one-half to five and one-half feet, which were exhibited before the jury and which the jury read and observed throughout the closing arguments. These summary charts were not based upon the evidence and in fact were produced to establish that $20,000 of the monies involved in the indictment was paid to Petitioner, when there was no such evidence in the case. The courts below held these inflammatory summaries to be admissible if based upon information obtained by the investigator, not necessarily based on evidence in the record. These rulings are contrary to *United States v. Johnson*, 319 U.S. 579, 63 S. Ct. 1233; *United States v. Goldberg*, 401 F.2d 644, C.A. 2, (1968); and *United States v. Ward*, 169 F.2d

460 C.A. 3, (1948) and *McDaniel v. United States*, 343 F.2d 785, 789 C.A. 5, (1965).

Petitioner, at the conclusion of the Government's evidence, moved for a directed verdict of acquittal on the ground that the prosecution had failed to establish the conspiracy charge and that the seven substantive offenses were illegal because done as overt acts pursuant to that conspiracy. The rulings below concerning Petitioner's motion for a directed verdict are contrary to *Glasser* and to *Windsor v. United States*, 384 F.2d 525, C.A. 9, (1967); *Causey v. United States*, 352 F.2d 203, C.A. 5, (1965); *Bernard v. United States*, 342 F.2d 309, C.A. 9, (1965) and *United States v. Watson*, 293 F.Supp. 694, D.C.W.D. Mo., (1968).

The courts below permitted evidence against Petitioner of the conviction of the alleged co-conspirator, Gaskin, in an earlier trial, although that earlier conviction was pending on appeal, contrary to *Krulewitch v. United States*, 336 U.S. 40; *Michaelson v. United States*, 335 U.S. 469; *Hamilton v. United States*, 409 F.2d 928, C.A. 5, (1969); *West v. Henderson*, 409 F.2d 95, C.A. 6, (1969); *Fenwick v. United States*, 252 F.2d 124, C.A. D.C., (1958); and *Drew v. United States*, 331 F.2d 85, C.A. D.C., (1964).

The courts below permitted evidence that an alleged conspirator, DeLong, committed suicide, to infer Petitioner's guilt. No evidence in this record links the suicide with the facts charged in the indictment. The prosecution knew, or should have known that this suicide was caused by facts other than those here involved. Coupled with the admission of the conviction of Gaskin, this irrelevant evidence of suicide deprived Petitioner of a fair trial. Moreover, in two articles published in the Birmingham News, defendant's Exhibit 1, on April 15, 1969 and in the Birmingham Post-Herald, published on April 16, 1969, prejudicial material appeared describing the prior trial, the suicide of DeLong and the prior conviction of Gaskin. Defendant's Exhibit 2 ended up in the jury room with the jury prior to the return of its verdict. Defendant's Exhibits 1 and 2 are printed in Appendix C to this petition. The prejudice from the April

16, 1969 article, obviously read by the jury, is plain. The refusal of the courts below to grant a mistrial because of this prejudicial newspaper article, obviously read by the jury because it was found in the jury room prior to the verdict, is contrary to *Marshall v. United States*, 360 U.S. 310, 79 S. Ct. 1171 (1959); *United States v. Smith*, 403 F.2d 74, C.A. 6, (1968); *Silverthorn v. United States*, 400 F.2d 627, C.A. 9, (1968), and *Dallago v. United States*, Case No. 22174, U.S. App. D.C. (Nov. 7, 1969). _____ F.2d _____.

CONCLUSION

The important questions involved showing Petitioner was deprived of a hearing on this involved appeal, contrary to due process and to the Federal Rules of Appellate Procedure of this Court, and the other important questions showing that Petitioner has been deprived of a fair trial and is being deprived of his liberty without due process, should be reviewed and decided by this Court to further the proper administration of justice in criminal cases. For the reasons and grounds stated in this Petition, the erroneous decision below should be reversed and it is prayed that this Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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Dated December 16, 1969

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 27762

Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

SEYMOUR (SY) POLLACK,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Alabama

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(October 1, 1969)

Before BELL, AINSWORTH and GODBOLD, Circuit Judges.

PER CURIAM: Appellant was convicted of eight counts of mail fraud, fraud in the sale of securities, and related offenses.

Pursuant to new Rule 18 of the Rules of this court, we have concluded on the merits that this case is of such character as not to justify oral argument and

have directed the clerk to place the case on the Summary Calendar and to notify the parties in writing. See *Murphy v. Houma Well Service,* 5 Cir. 1969, 409 F.2d 804.

Appellant attacks the admission into evidence of corporate minute books relating to periods several years before the acts with which he is charged. His objections are not to their contents, except by implication that they were either irrelevant or cumulative. He asserts that these additional exhibits, added to a record already complex and voluminous, made the evidence too difficult for the jury to grasp. If error at all, no prejudice to appellant is shown.

There was no error in denying the motion for mistrial based on accounts of the trial carried in local newspapers. The trial judge considered the articles and determined that they were no more than accurate and contemporaneous reports of the trial proceedings, but nevertheless interrogated the jury when both sides had rested and ascertained that no juror had seen the articles. This case is not even remotely similar to *Sheppard v. Maxwell,* 384 U.S. 333, 16 L.Ed.2d 600 (1966) or *Estes v. Texas,* 381 U.S. 532, 14 L.Ed. 2d 543 (1965).

The evidence concerning expenditures by appellant at a hotel in Miami was relevant to show disposition of funds allegedly received in the fraudulent undertakings, and the fact that some of the evidence may have been repetitious does not cause it to be prejudicial.

Summaries prepared by an accountant of various complex transactions were admissible. The accountant was qualified as an expert and testified that the summaries were based on matter in evidence. ***McDaniel v. United States*, 343 F.2d 785 (5th Cir. 1965).**

AFFIRMED.

APPENDIX B

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

Amendment V to the United States Constitution in its applicable part provides:

> "No person shall * * * be deprived of his life, liberty, or property, without due process of law; * * *."

Amendment VI to the United States Constitution provides:

> "In all criminal prosecution, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence."

18 U.S.C., Sec. 371 in its applicable part provides:

> "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five year, or both. * * *"

18 U.S.C., Sec. 1341 provides:

> "Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security,

or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both. June 25, 1948, c. 645, 62 Stat. 763; May 24, 1949, c. 139, Sec. 34, 63 Stat. 94."

15 U.S.C., Sec. 77(q)(a) provides:

It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly -

(1) to employ any device, scheme, or artifice to defraud, or

(2) to obtain money or property by means of any unture statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser."

18 U.S.C., Sec. 1343 provides:

"Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign

commerce, any writing, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both. Added July 16, 1952, c. 879, Sec. 18(a), 66 Stat. 722, and amended July 11, 1956, c. 561, 70 Stat. 523."

18 U.S.C., Sec. 2314, in its applicable part, provides:

"Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud; * * *"

Rule 34, Federal Rules of Appellate Procedure, in its applicable part provides as follows:

"Oral Argument. (a) Notice of Argument; Postponement. The clerk shall advise all parties of the time and place at which oral argument will be heard. A request for postponement of the argument must be made by motion filed reasonably in advance of the date fixed for hearing.

(b) Time Allowed for Argument. Unless otherwise provided by rules for all cases or for classes of cases, each side will be allowed 30 minutes for argument. If counsel is of the opinion that additional time is necessary for the adequate presentation of his argument, he may request such additional time as he deems necessary. Requests may be made by letter addressed to the clerk reasonably in advance of the date fixed for the argument and shall be liberally granted if cause therefor is shown. A party is not obligated to use all of the time allowed, and the court may terminate the argument whenever in its judgment further argument is unnecessary.

(c) Order and Content of Argument. The appellant is entitled to open and conclude the argument. The opening argument shall include a fair statement of the case. Counsel will not be permitted to read at length from briefs, records or authorities.

* * * * * *

(f) Submission on Briefs. By agreement of the parties, a case may be submitted for decision on the briefs, but the court may direct that the case be argued."

Rule 47, Federal Rules of Appellate Procedure, in its applicable part provides as follows:

"Rules by Court of Appeals.

Each court of appeals by action of a majority of the circuit judges in regular active service may from time to time make and amend rules governing its practice not inconsistent with these rules. In all cases not provided for by rule, the courts of appeals may regulate their practice in any manner not inconsistent with these rules. * * *."

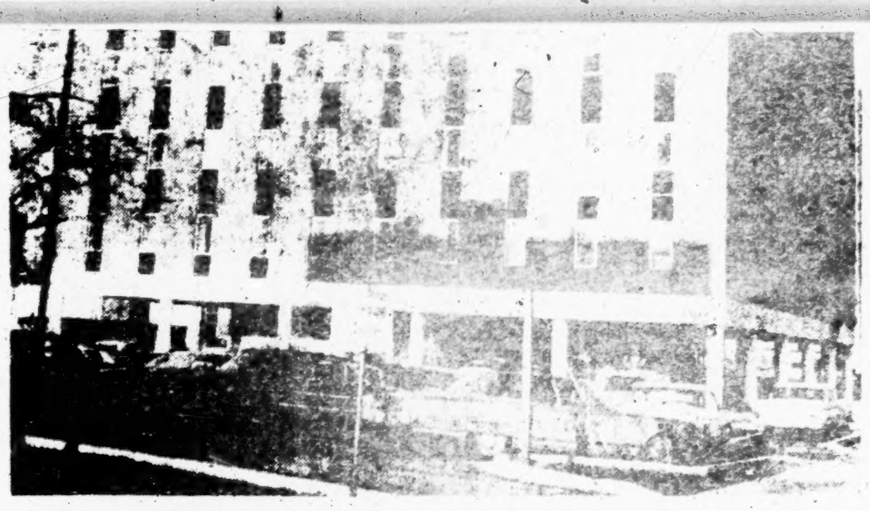
Rule 18, Court Rules, United States Court of Appeals For The Fifth Circuit, reads as follows:

"Summary Calendar

(a) Whenever the court, sua sponte or on suggestion of a party, concludes that a case is of such character as not to justify oral argument, the case may be placed on the summary calendar.

(b) A separate summary calendar will be maintained for those cases to be considered without oral argument. Cases will be placed on the summary calendar by the clerk, pursuant to directions from the court.

(c) Notice in writing shall be given to the parties or their counsel of the transfer of the case to the summary calendar."



Building to be dedicated

Dedication ceremonies will be held at 10 a.m. Monday for the recently completed Center for Development and Learning Disorders, a new training ground at Birmingham for persons learning to work with the mentally retarded and other victims of learning disabilities. Located in the University of Alabama Medical Center at the corner of 19th Street and Seventh Avenue South, the building cost $2.8 million. The building was gradually occupied by faculty and staff during January and February, and now is in operation. Dedication activities will consist of formal 10 a.m. ceremonies at the University Engineering Building and afternoon professional seminar, and public tours of the building from 1 p.m. until 5 p.m.

Businessman being tried on charge of conspiracy

Seymour Pollack, a New Jersey businessman, is on trial in federal court in Birmingham today on charges of conspiring to defraud a local insurance company of $639,000.

Pollack was charged in a 1967 indictment by a federal grand jury of conspiring with Palmer Keith Jr., a Birmingham attorney, and J. Ernie Gaskin, a Little Rock, Ark., businessman, to defraud United Security Life Insurance Co.

GASKIN AND Keith were tried in May 1968. Gaskin was convicted on seven of eight counts, Keith was found innocent.

Pollack's trial was delayed because he was too sick to leave his hospital bed last year.

Testimony in the earlier trial identified Keith as general counsel and assistant secretary for United Security and Gaskin as president of a Little Rock insurance company that became insolvent.

POLLACK OFFERED to get a loan for Gaskin to pay his company's creditors, according to Gaskin's testimony.

Later the two sold stock, described as "worthless," to United Security Life for $300,000, according to the indictment and testimony in the earlier case.

Keith said he followed orders of the company's president, the late William DeLong, in his work for the insurance firm.

DeLong died before the trial. Company officials and authorities said he committed suicide.

Eight men and four women are hearing the case against Pollack. U. S. Dist. Judge C. W. Allgood is presiding.

Husband's pain brings robbery

ROCHESTER, N. Y. (AP) — A young woman in her 20s robbed a druggist at knifepoint Monday, taking only narcotics she said was needed to ease the pain of her husband who was dying of cancer.

Police said she fled up

facilities, to be locat Birmingham.

The cancer hospital let Alabamians "avail selves to the latest dru treatment techniques," McKnight, an agent for ty National Life Insuran

Aborigine infant

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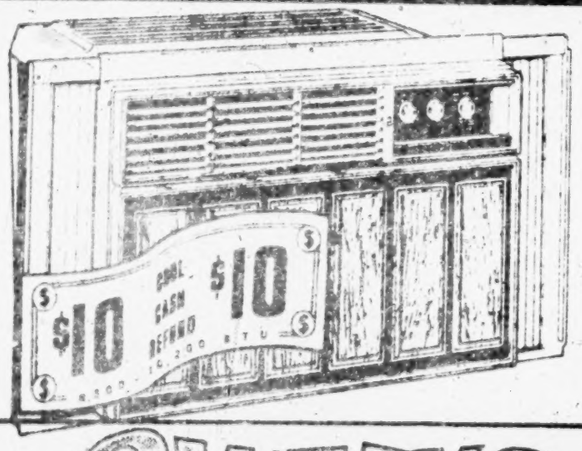

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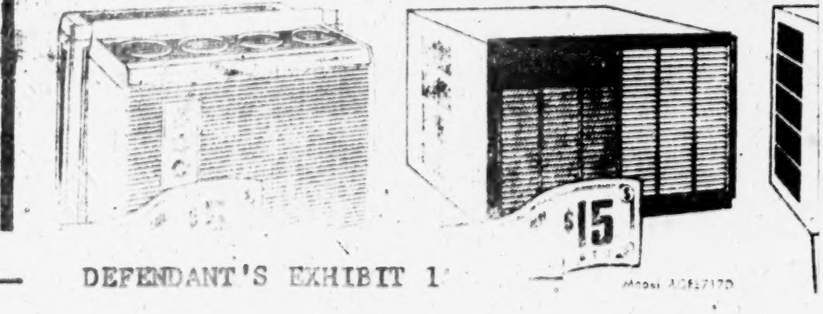

DEFENDANT'S EXHIBIT 1

In its fight against crime, added, there are many problems with which criminal justice cannot deal, such as the decline in parental authority and control over children and youth.

But the main problem facing police departments is personnel, Parsons said.

He also blasted the career system in use in most police

Reluctance To Change

"Many of our problems stem from our reluctance to change," Parsons said.

"Society is based on a system of rewards and punishment and everything has a cause and effect," Parsons said. This being so, he added, people should study claims of brutality by police.

—This curve, as it passes the intersection of Airport one of the most perplexing problems facing city of s to be a re-design of the curve—making it for less

Cause Of Deaths

at $90,000, most of which would go for the purchase of right-of-way.

Traffic Engineer Ben Robinson said "stretching out the curve," as the Engineering Department plans, is a possible means of cutting down on the number of accidents.

Presently, he said, there is only a 290-foot radius to the curve, although the recognized standard is 880 feet.

He said changing the design of the curve could help cut down on the number of vehicles that run off the street.

Pulling out a hefty file on the stretch of highway, Robinson said the case history goes back at least to 1964.

Robinson's men found a 15-foot strip of pavement which was unlike the remainder of the pavement. He said that when a sanitary sewer line was installed, asphalt that was not as skid resistant as the old pavement was used to replace the old asphalt.

This strip was then replaced with "first class" pavement, he said, and the accidents were reduced, although not by an appreciable amount.

So, in 1965, caution lights were installed warning motorists to slow down. A sign, telling drivers that the speed limit around the curve is 25 miles per hour when the street is wet, was installed in 1964, he said.

In another move to cut accidents, reflectorized signs were placed along the roadway to make it more visible at night, Robinson said.

Still the accidents are occurring.

St. Vincent's To See Fashion Show

Mrs. Inez Jackson will present a fashion show for the St. Vincent's Community and Family center parent's club at 4:30 p.m. Sunday at the center.

Mrs. Jackson is sewing instructor for the adult classes at the center.

There will also be an important business meeting, Mrs. Alberta Cleveland, president, and Mrs. Philomena Davis, center director, said.

Attorney Testifies

Gaskin, Pollack Didn't Own Stock

BY JANEAN MANN

Ernie Gaskin and Seymour "(Sy) Pollack did not legally own the stock they sold to United Security Life Insurance Co. for $300,000, a Little Rock attorney testified Tuesday during the second day of Pollacks federal fraud trial.

Claude Carpenter Jr., who was Gaskin's attorney in 1965, said he witnessed an agreement whereby Gaskin and Pollack, listed as owners of stock in Fifth Avenue Industries and General Holding Corp., sold the stock to the Birmingham company.

Earlier in the day, Gaskin, convicted last year on the same charges for which the New Jersey businessman is now being tried, told the jury he had obtained the stock from Nicholas Papadakos as collateral for a $5100 loan to Papadakos.

Title To Stock

The title to the stock, however, remained in Papadakos' name, Gaskin said.

According to a second agreement between Gaskin, Pollack and United Security, the two men would buy back the stock for $318,000 within a year. The agreement was signed by S. Palmer Keith Jr. and William DeLong for United, he said.

In testimony during the opening day of the trial, however, United Security secretary and former comptroller Joe Latsis said that Gaskin and Pollack had failed to purchase the stock although requested to do so.

United has been unable to find a market for that stock or for 100,000 shares in Gaskin's Southern American Life Insurance Co. which it bought for $100,000, Latsis said.

When questioned by U. S. Atty. R. Macey Taylor about the financial condition of Southern American at that time, Carpenter said it had only about $200 in cash. Gaskin also owed money to a number of persons in connection with a court recission order under which Gaskin was ordered to reimburse certain persons for stock he sold.

Much of the money which Gaskin received for the Fifth Avenue and General Holding Corp. stock — $200,000 — went into a special trust account in the name of two of Gaskin's other companies, Carpenter said.

Gaskin, Pollack and Birmingham attorney Keith were indicted by a federal grand jury on charges of conspiring to defraud United Security of more than $600,000.

Former United Security president William DeLong, who killed himself in 1966, was named as a co-conspirator in the indictment which also charged the group with forcing Southern American into receivership.

Keith was acquitted and Gaskin convicted during a trial in Birmingham last year, but Pollack's trial was rescheduled because of his illness at that time. Gaskin is currently appealing his conviction.

Flooding Continues In Midwest

By United Press International

Thousands of persons streamed out of Minot, N. D., and other flood-harried communities in the upper Midwest Tuesday as snow-gorged rivers struggled to burst their bonds.

Authorities said 9,500 of Minot's 34,000 residents would be out of their homes and safe on higher ground by Tuesday night ahead of a new crest expected to surge down the normally placid Mouse River.

The swollen Mississippi River neared an expected crest at St. Paul, Minn., and residents of the Minnesota capital city — where hundreds of suburban residents already were refugees — braced for three days of battle with old man river.

Downriver from St. Paul lowland residents stepped up evacuations in Wisconsin riverside cities. Police took over milk delivery in one section of Prairie Du Chien, Wis., and the mayor of La Crosse, Wis., asked for a National Guard patrol of dikes.

The orderly move out of the thousands at Minot boosted to more than 20,000 the number of persons who have been routed from their homes in the spring floods.

North Dakota counted 12,000 persons left temporarily homeless by high waters. More than 4,000 had been ousted from homes in South Dakota, more than 3,000 in Minnesota, some 700 in Iowa and 600 in Wisconsin.

In Senate

DEFENDANT'S EXHIBIT 2

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 994

SEYMOUR POLLACK,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

APPENDIX D TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

Bert B. Rand
Hans A. Nathan
Warren E. Magee
1730 K Street, N.W.
Washington, D. C. 20006
Counsel for Petitioner

APPENDIX D
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Letter of Edward W. Wadsworth, Clerk United States Court of Appeals for the Fifth Circuit, dated September 23, 1969, notifying counsel that the Court transferred the appeal to the summary calendar for disposition D-1

Judgment of the United States Court of Appeals for the Fifth Circuit, dated October 1, 1969, affirming judgment of the District Court pursuant to Rule 18 . . . . . D-4

Order, United States Court of Appeals for the Fifth Circuit, dated October 28, 1969, denying Petition for Rehearing D-5

D. 1

United States Court of Appeals

FIFTH CIRCUIT

OFFICE OF THE CLERK

September 23, 1969

TO COUNSEL OR PARTIES LISTED BELOW:

No. 27762 – U.S.A. v. Seymour (Sy) Pollack

Dear Sirs:

You are hereby notified that a panel of this court, after due consideration and pursuant to Local Rule 18, has transferred the within case ~~to~~ the summary calendar for disposition.

Yours sincerely,

EDWARD W. WADSWORTH, Clerk

By _____
Deputy Clerk

cc: Mr. Fred Blanton, Jr.
Mr. Arthur J. Hanes
Mr. R. Macey Taylor

See Rules 17-20 attached.

COURT RULES

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

NEW RULES 17-20

December 6, 1968

Rule 17.

DOCKET CONTROL

In the interest of docket control, the chief judge may from time to time, in his discretion, appoint a panel or panels to review pending cases for appropriate assignment or disposition under Rules 18, 19 or 20 or any other rule of this court.

Rule 18.

SUMMARY CALENDAR

(a) Whenever the court, sua sponte or on suggestion of a party, concludes that a case is of such character as not to justify oral argument, the case may be placed on the summary calendar.

(b) A separate summary calendar will be maintained for those cases to be considered without oral argument. Cases will be placed on the summary calendar by the clerk, pursuant to directions from the court.

(c) Notice in writing shall be given to the parties or their counsel of the transfer of the case to the summary calendar.

Rule 19.

MOTION TO DISMISS OR AFFIRM

Within fifteen days after the appeal has been docketed in this court, the appellee may file a motion to dismiss or a motion to affirm. Where appropriate, a motion to affirm may be united

in the alternative with a motion to dismiss. The fifteen day provision may be waived by the court on proper showing of reasonable excuse for delay in filing a motion to dismiss or affirm, upon such terms and conditions as the court may prescribe, or such waiver may be granted sua sponte on the part of the court.

(a) The court will receive a motion to dismiss any appeal on the ground that the appeal is not within the jurisdiction of this court.

(b) The court will receive a motion to affirm the judgment sought to be reviewed on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

The motion to dismiss or affirm shall be filed with the clerk in conformity with Rule 27 of the Federal Rules of Appellate Procedure.

The appellant shall have ten days from the date of receipt of the motion to dismiss or affirm within which to file a response opposing the motion. Such response may be typewritten and four copies, with proof of service, shall be filed with the clerk. Upon the filing of such response, or the expiration of the time allowed therefor, or express waiver of the right to file, the record on appeal, motion and response shall be distributed by the clerk to the court for its consideration.

After consideration of the papers distributed pursuant to the foregoing paragraph the court will enter an appropriate order.

The time for filing briefs pursuant to Rule 31 of the Federal Rules of Appellate Procedure shall not be tolled or extended by the filing of a motion to dismiss or affirm.

Rule 20.

FRIVOLOUS AND UNMERITORIOUS APPEALS

If upon the hearing of any interlocutory motion or as a result of a review under Rule 17, it shall appear to the court that the appeal is frivolous and entirely without merit, the appeal will be dismissed without the notice contemplated in Rules 18 and 19.

United States Court of Appeals

FOR THE FIFTH CIRCUIT

[Caption omitted in printing]

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Alabama, and was taken under submission by the Court upon the record and briefs on file, pursuant to rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

Issued as Mandate: October 1, 1969

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

[Caption omitted in printing]

ON PETITION FOR REHEARING

Before BELL, AINSWORTH and GODBOLD, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

COURT, U. S.

FILED

JAN 30 1970

No. 994

In the Supreme Court of the United States

OCTOBER TERM, 1969

SEYMOUR POLLACK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,

WILL WILSON,
Assistant Attorney General,

BEATRICE ROSENBERG,
EDWARD FENIG,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 994

SEYMOUR POLLACK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on October 1, 1969. A petition for rehearing was denied on October 28, 1969. Mr. Justice Black extended the time for filing a petition for a writ of certiorari to December 27, 1969, and on December 24, 1969, the petition was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the multi-count indictment involving the fraudulent depletion of the assets of a life insurance company was unduly lengthy and erroneous in its joinder of counts.

2. Whether it was prejudicial error to admit evidence of the death of one alleged conspirator, the conviction of another who testified as a prosecution witness, and certain charts based on the evidence admitted at trial.

3. Whether the government illegally suppressed evidence concerning broker's records of bid and asked prices on the unlisted stocks which petitioner sold to the life insurance company.

4. Whether the newspaper coverage of the trial, which the jurors indicated they had not read, affected petitioner's trial.

5. Whether, on appeal, it was necessary for the court of appeals to hear oral argument before it rendered an opinion in petitioner's case.

STATEMENT

After a jury trial in the United States District Court for the Northern District of Alabama, petitioner was convicted of conspiracy and of seven substantive counts involving mail fraud, fraudulent use of interstate wire communications, and interstate transportation of a stolen check obtained as a result of fraud, in violation of 18 U.S.C. 371, 1341, 1343, 2314, and 15 U.S.C. 77(q)(a). On April 17, 1969, he was sentenced to five years' imprisonment on each count, to be served concurrently.

The evidence showed that during the period between October 1965 and February 1966, the assets of the United Security Life Insurance Company of Birmingham, Alabama, were depleted by more than $639,000 (2 R. 646).[1] During this time, and for some time before, William DeLong was the operating head of United Security and one Keith was the general counsel of the company (1 R. 80–81). Petitioner was a New Jersey businessman who operated Transamerican Marketing Corporation as his corporate alter ego (2 R. 355, 439, 454, 486, 507, 587, 609). Named in the indictment as a fourth conspirator was J. Ernie Gaskin, the owner of a dormant life insurance company, Southern American Life Insurance Company, chartered in Arkansas (1 R. 1–25, 332–333, 2 R. 596–598).[2]

Beginning in 1963, the affairs of United Security had been under critical scrutiny by regulatory authorities (1 R. 147, 215, 231, 241–243, 2 R. 654, 657). DeLong would not allow corporate directors to examine the corporate books (1 R. 218). On August 26, 1965, DeLong was given the authority to sell stocks and bonds owned by United Security at prevailing market prices (1 R. 82, 218). Petitioner met DeLong (1 R. 86, 2 R. 523) shortly thereafter.

---

[1] "R." preceded by the volume number refers to the three volume record of trial on file with the Clerk of this Court. The trial transcript is contained in volumes 1 and 2.

[2] DeLong committed suicide in March 1966 (1 R. 197). Petitioner's trial was severed from that of Keith and Gaskin, who were tried first. Keith was acquitted and Gaskin was convicted (1 R. 263, 280).

The depletion of the assets of United Security was accomplished by means of three transactions. The October 1965 transaction involved stock in two corporations, Fifth Avenue Industries and General Holding Corporation, which petitioner and Gaskin received as collateral for a $5,500 loan that Gaskin promised to make (1 R. 100, 263–277, 320, 2 R. 404). DeLong authorized his company to buy these securities from petitioner and Gaskin for $300,000. The stocks so purchased were unlisted, had little or no value (1 R. 48–54, 83, 101, 118, 155), and later efforts to sell them on the over the counter market were unsuccessful (1 R. 103, 190).[3] The second depletion transaction occurred in December 1965 when DeLong as president of United Security authorized his company to purchase 100,000 shares of Gaskin's life insurance company, Southern American Life (1 R. 55–58, 106–107). United Security Life paid $100,000 for this purchase of shares in a company which had little or no value and which could not be sold by United Security when an effort was later made to dispose of them (1 R. 59, 111).[4] During January and February

[3] While the transaction was described as a purchase, it was subject to petitioner's agreement to buy back the shares at a profit to United Security (1 R. 324). His corporate checks, issued by his Transamerican Marketing Corporation, in a purported later effort to buy back the securities, were dishonored on presentation (1 R. 59–63).

[4] The shares bought by United Security had been issued by Southern American Life to petitioner's corporation, Transamerican Marketing Corporation. Petitioner endorsed the stock certificates for Transamerican. The United Security check for $100,000 for the Southern American Life shares was deposited to the credit of Transamerican (1 R. 57, 107–109, 334).

1966 the third transaction occurred. It involved a planned sale of a portion of United Security's participating policies already in effect (1 R. 127). These policies were to be sold to Southern American Life, which was then headed by petitioner, instead of by Gaskin (2 R. 475, 543). In order to safeguard the interests of policyholders, a necessary step for such a sale (called reinsurance), was the transfer by the selling company to the reinsuring company of the reserves previously set aside to insure payment of the policies upon their maturity (1 R. 107, 120–121). As part of the planned agreement, United Security transferred to Southern American Life cash or listed securities having a total value of approximately $239,000 (1 R. 125, 133, 2 R. 540, 558, 571). The reinsurance agreement never was implemented (2 R. 503), but United Security never received the return of its cash or the listed securities which it had forwarded to Southern American Life Insurance Company (1. R. 120, 137).

Petitioner shared in the proceeds of both the October and December 1965 transactions (1 R. 256, 259, 329, 330, 342–348). He supervised the distribution of the $239,000 involved in the planned January-February 1966 reinsurance agreement and received a portion of this money for his own benefit (2 R. 557–571).

After DeLong's suicide in March 1966, United Security was found to be insolvent (1. R. 199). A director of that company then visited petitioner in Arkansas and sought to obtain reimbursement (1 R. 201). Petitioner explained his inability to reimburse

the company by stating that he had paid DeLong $40,000 of the money he had obtained from United Security, and that another part of the money had been used to pay some of Gaskin's debts (2 R. 204–206).[5]

At trial, there was no objection to the evidence that DeLong had committed suicide (1 R. 81, 197). Gaskin was called as a prosecution witness and testified that he had been found guilty at the earlier trial (1 R. 263). His other testimony concerned an October 1965 trip from Arkansas to New York where he met petitioner and one Papadakos, the owner of the shares of Fifth Avenue Industries and General Holding Corporation. He testified that he agreed to lend the owner $5,500 if the shares were pledged as collateral for the loan (1 R. 265–273) and that he thereafter received the stock in Arkansas (1 R. 273).[6]

As its final witness, the government presented the testimony of a certified public accountant who had spent some years investigating the affairs of United Security Life. This witness used three charts (Exhib-

[5] Gaskin had had previous difficulties with Arkansas insurance and securities authorities. In obtaining the money from United Security Life, the services of an Arkansas attorney, Carpenter, were used, with Carpenter serving as trustee. He deposited such money as petitioner and Gaskin gave him in his trustee's account in Arkansas. Carpenter thereafter made disbursements pursuant to petitioner's or Gaskin's directions, with some of the money being used to satisfy Gaskin's obligations arising from losses caused by stock issues of companies that Gaskin controlled. Carpenter also identified his trustee's check to DeLong in the amount of $40,000, which he stated he had issued pursuant to petitioner's instructions (1 R. 312, 342–348, 353, 2 R. 362–369).

[6] The subsequent transfer of these shares by petitioner and Gaskin from Arkansas to Alabama was the substantive offense alleged in Count 5 of the indictment (1 R. 96, 292).

its 162–164) to show the disposition which had been made of the United Security assets obtained by petitioner and Gaskin, the $300,000 in October 1965, the $100,000 in December 1965, and the $239,000 obtained in January–February 1966 (2 R. 630–636).

ARGUMENT

1. Despite petitioner's assertions, the indictment was not unduly lengthy. In the present case, there was a complex and continuing scheme which involved the ownership of shares of at least six corporations, the activities of four alleged conspirators, and multiple transfers of funds and securities among corporations and conspirators. The particularity of the indictment forestalled any request for a bill of particulars by the defense and served to make clear the ramifications of the charges which the prosecution hoped to prove.

Petitioner is mistaken when he states that the seven substantive offenses were "unrelated" to the conspiracy alleged in Count 1 (Pet. 10). On the contrary, each substantive offense was but one of many overt acts committed in furtherance of the conspiracy. All overt acts, whether charged as substantive offenses or not, were admissible as circumstantial evidence that the conspiracy existed. *United States* v. *Gosser,* 339 F. 2d 102, 110 (C.A. 6), certiorari denied, 382 U.S. 819; See *Pereira* v. *United States,* 347 U.S. 1, 12–13. The fact that petitioner did not know DeLong and Keith on August 26, 1965, when the conspiracy allegedly started with DeLong receiving from his board of directors authorization to sell assets, did not lessen

petitioner's culpability. A belated joiner of a conspiracy is equally liable with the one who originated the common scheme. *Blumenthal* v. *United States,* 332 U.S. 539, 557. Petitioner was an active member of the conspiracy when the substantive offenses occurred.

2. Petitioner's assertions regarding the admission of certain evidence relating to his co-conspirators are groundless. The indictment read that DeLong at the time of indictment was deceased (1 R. 1), and at trial evidence was admitted to the effect that DeLong had committed suicide. The fact that he had committed suicide was a neutral circumstance since the reason for his suicide (see Pet. 11) was not inquired into by either side. As for Gaskin, the government clearly had a right to call him as a government witness after he had been convicted at the earlier trial. The government made no effort to imply that petitioner was guilty by reason of Gaskin's prior conviction. Indeed, it was the government counsel who brought out that Gaskin was appealing his conviction (1 R. 264). The court twice instructed that Gaskin's conviction was not of any probative value in determining petitioner's innocence or guilt (1 R. 264, 2 R. 671). On the other hand, petitioner's counsel repeatedly noted that Keith had been acquitted at the earlier trial with Gaskin (2 R. 375, 396, 431). Under such circumstances it is clear that the jury in the present case could not have been swayed by the results of the Gaskin-Keith trial and that knowledge by the jury of Gaskin's conviction was not improper. See *Dobbins* v. *United States,* 408 F. 2d 973 (C.A. 5) No. 229, this Term, certiorari denied, 396 U.S. 829, 937; *United States* v. *Vida,* 370 F. 2d

759 (C.A. 6), certiorari denied, 387 U.S. 910; *United States* v. *Brill,* 350 F. 2d 171, 174 (C.A. 2), certiorari denied, *sub nom. Scalza* v. *United States,* 382 U.S. 973.[7]

3. It was proper to use the summaries in order to explain the other 161 exhibits which had been admitted into evidence. Such summaries were not inflammatory hearsay (cf. Pet. 5, 10) since the expert testified as to the evidentiary basis of the summaries or charts. At trial, the charts were objected to as being "repetitive" and "cumulative" (2 R. 632), indicating that petitioner's trial counsel did not regard the charts as other than summaries of what had previously been presented. Petitioner is similarly mistaken when he asserts that the exhibits relied upon in the preparation of the summaries were not sent into the jury room (Pet. 10). The trial transcript shows they were (2 R. 707). Summaries, based upon competent evidence already before a jury are admissible as a convenient and desirable aid to a jury's understanding of a long and complicated set of facts. *United States* v. *Rath,* 406 F. 2d 757 (C.A. 6), certiorari denied, 394 U.S. 920; *Swallow* v. *United States,* 307 F. 2d 81, 84 (C.A. 10), certiorari denied, 371 U.S. 950.[8]

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[7] None of the cases cited by the petitioner on this point (Pet. 11), are applicable to the present situation in which the co-defendant took the stand and testified against the defendant being tried.

[8] There was evidence to show that petitioner received $30,000 in cash (cf. Pet. 10). Carpenter, the attorney from Arkansas who served as trustee for petitioner and Gaskin, testified that one United Security Life check was exchanged for a banker's check in a lesser amount, with petitioner receiving the $30,000 residue in cash (1 R. 326).

4. There is no evidence that the government suppressed evidence of brokers' records of bid and asked prices on the unlisted stocks which petitioner and Gaskin sold to United Security Life in October and December 1965. Stockbrokers, as an aid in conducting their business, are furnished by financial service companies with "pink sheets", which contain the bid and and asked prices of unlisted securities (1 R. 101, 118, 168). The defense elicited information from a government witness that at one time one of the stocks sold to United Security Life by petitioner and Gaskin had a "pink sheet" bid price of $3 per share (1 R. 170–171). This value was disputed by the government, which presented evidence that the large quantities of shares acquired by United Security Life could not thereafter be sold (1 R. 103, 190).[9] Clearly, if petitioner believed that the "pink sheets" could have helped to establish value, he could have produced them or sought assistance from the government in obtaining them, since he knew of their existence and of their favorable implications.

5. During trial, the court repeatedly admonished the jurors not to read any newspaper accounts of the case (1 R. 37, 66, 119, 157, 211, 277, 336). Petitioner's counsel made several motions on the basis that a newspaper had reported the trial proceedings, that this paper was "available to members of the jury" (1 R. 213) and that such publicity was prejudicial (1 R. 337–338). The court replied that the article ap-

[9] Gaskin promised the owner of 150,000 shares a loan of $5,500 upon their being pledged (2 R. 270), thus giving them a value for collateral purposes of less than 4 cents a share.

peared to be an accurate account of the trial and that, in addition, he had instructed the jury not to read newspaper accounts (1 R. 338). After the last witness for the government had testified, the defense counsel reported that, during a recess, he had gone into the jury room and found there a newspaper containing an account of the trial. The bailiff averred that he had not seen such newspaper when he had previously checked the jury room (2 R. 659–660). The court questioned the jurors as to whether they had read newspaper accounts of the trial and none responded that they had done so (2 R. 662–663).

It was proper for the trial court to ascertain the lack of exposure by a collective inquiry addressed to the jurors. In view of the repeated admonitions to the jury not to read news accounts of the trial and their indication that they had refrained from doing so, it was not error for the trial court to deny the defense motions for mistrial. *Margoles* v. *United States,* 407 F. 2d 727 (C.A. 7), No. 289, this Term, certiorari denied, 396 U.S. 833, *Pearson* v. *United States,* 378 F. 2d 555 (C.A. 5).

6. The validity of Rule 18 of the Rules of the Court of Appeals for the Fifth Circuit (1968) permitting disposition of a case on briefs without oral argument is an issue raised in *Ambers* v. *United States,* No. 799, this Term, certiorari denied, January 19, 1970. For the reasons stated in our brief in opposition to the petition for a writ of certiorari in that case, the rule does not deprive an appellant of his right to due process or representation by counsel.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 994

SEYMOUR POLLACK,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF OF PETITIONER ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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The manner in which Respondent has reversed and treated the questions presented warrants the filing of this Reply Brief by Petitioner in order that the important questions involved may be properly presented to this Court.

REPLY TO RESPONDENT'S STATEMENT

Petitioner argued (Pet. 9) that without proof of the existence of the conspiracy charged and without proof connecting Petitioner with that conspiracy, Respondent's evidence

concerning the substantive offenses charged in Counts 2 through 8 of the indictment concerning overt acts only, Petitioner's conviction cannot stand. Petitioner argued that *Glasser v. United States,* 315 U.S. 60, 74; 62 S.Ct. Rep. 457, 468, requires competent evidence or proof *aliunde* of the conspiracy and of Petitioner's connection with that conspiracy. Proof of later substantive overt acts is not sufficient to establish the broad and vast conspiracy charged in Count 1, which had to have been formed prior to August 26, 1965, the date when the first overt act occurred (Pet. 10; R. 11-15). The individual transactions described as overt acts in Counts 2 through 8 would be illegal only on the theory that each was part of the vast conspiracy described in Count 1, having for its purpose fraudulently obtaining monies, securities and other assets of the United Securities Life Insurance Company. Absent proof *aliunde* of the conspiracy and of Petitioner's connection with it, these open financial transactions conducted at arm's length between representatives of the corporations involved with the advice of two competent counsel, including Mr. Keith, general counsel for United, were lawful and were conducted in the regular course of business. The only persons under the allegations of the indictment who could have conspired and formed the conspiracy prior to August 26, 1965 are DeLong, President of United, and Keith, its "prominent" general counsel. But this theory failed and was demolished at the first trial because Keith was acquitted on all eight counts.

Instead of directing its Statement (Br. 2-7) to this problem and answering Petitioner's Statement, Respondent has gone into details of the substantive transactions involved in Counts 2 through 8 and has set forth *no evidence* establishing the existence of the conspiracy prior to August 26, 1965 and no evidence connecting Petitioner with that conspiracy. Respondent's Statement admits that the prosecution submitted hearsay evidence that DeLong, President of United, committed suicide (Br. 6) and evidence that Gaskin,

an alleged conspirator, had a prior conviction under the same indictment, notwithstanding that this conviction was not final because Gaskin was appealing it (Br. 8).[1]

REPLY TO RESPONDENT'S ARGUMENT

1. Respondent argues the indictment was not unduly lengthy and Petitioner is mistaken when he states the seven substantive offenses were "unrelated" (Br. 7). Respondent misconstrues Petitioner's argument. Counts 2 through 8 charge substantive offenses of unrelated crimes, like mail fraud, sale of securities in interstate commerce, use of interstate wire communication facilities and interstate transportation of securities. Obviously, the joining of such offenses in a single indictment without a conspiracy count involving all of them is not permitted under the Federal Rules of Criminal Procedure (Rule 8, F.R. of Crim. Procedure).

Absent proof *aliunde* of a conspiracy, the prejudicial joinder in a single indictment of such unrelated substantive offenses is unwarranted. This case demonstrates the evil inherent in broad conspiracy charges where strict order of proof is not required by the trial judge in the interest of justice. This lack of order of proof below resulted in a hodgepodge of evidence concerning unrelated transactions and then the evidence of these unrelated transactions was erroneously held below to establish the conspiracy. This is contrary to *Glasser.*

Respondent admits the overt acts are relied upon entirely to prove the conspiracy without any other evidence establishing it. In support of this novel position, Respondent cites *United States v. Gosser,* 339 F.2d 102, 110 (C.A. 6, 1964). We do not so read *Gosser. Gosser* holds (p. 110),

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[1]The prejudice of submitting a non-final judgment of conviction was compounded because Gaskin was acquitted on Count 2 (Docket Entries, First Section, Appendix 1, p. 3). This acquittal Respondent did *not* place before the jury.

"Once the existence of the conspiracy is clearly established, slight evidence may be sufficient to connect a defendant with it." *Gosser* discusses the evidence *aliunde* establishing the conspiracy at length. *Gosser* does not support Respondent's argument.

Respondent suggests in connection with this erroenous argument that the Court "See *Pereira v. United States*, 347 U.S. 1, 12-13" (Br. 7). *Pereira* did not hold overt acts are admissible without evidence of the conspiracy *to prove* the conspiracy and a defendant's connection with it. *Pereira* merely held (p. 12) the evidence *aliunde* in that case was sufficient to establish a conspiracy. In *Pereira* the existence of the conspiracy to defraud was not even denied! If a conspiracy is established by proof *aliunde* a person may join in the conspiracy and become a member of the conspiracy, as stated in *Blumenthal v. United States*, 332 U.S. 539, 577. *Blumenthal* does not apply because there was no evidence establishing a conspiracy and no evidence connecting Petitioner with it.

2. Respondent admits (Br. 8) that the prosecution introduced evidence that DeLong had committed suicide and that Gaskin had been convicted under the same indictment at an earlier trial, notwithstanding that Gaskin was appealing his conviction. Respondent's argument that the jury was not swayed by evidence of Gaskin's conviction and DeLong's suicide needs little comment. The prejudice of this evidence is plain. Instructions of the Court that this evidence doesn't prove Petitioner's guilt did not cure that prejudice. In reply to such an argument we quote what this Court held in *Krulewitch v. United States*, 336 U.S. 440, at 453, 69 S.Ct. 716 (1949):

> "The naive assumption that prejudicial effects can be overcome by instructions to the jury, * * * all practicing lawyers know to be unmitigated fiction."

3. In regard to the blown up exhibits of the prosecution prepared and presented by a Government investigator, measuring up to three and one-half by five and one-half feet,

Respondent argues "Such summaries were not inflammatory hearsay" since the expert testified as to the bases for these summaries. This argument and the cases cited miss our point. These summaries contained prejudicial evidence not presented during the trial that petitioner received personally $20,000 of the "fraud" funds. Except for the decision below, we have found no case holding hearsay summaries can be received in evidence unless those summaries are based upon evidence before the jury. We assert the authorities cited in our Petition establish the inadmissibility of these summaries and the prejudice resulting from their use by placing them before the jury for the jury to examine and see during the taking of the evidence and throughout the arguments is plain.

The DeLong suicide, the Gaskin conviction and these summaries are "skunk in the jury box" and "bloody clothes" approaches vehemently condemned because they deprive the citizen of a fair trial.[2]

4. Petitioner has pointed out that the record below establishes that Respondent bottomed this prosecution on

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[2]See *Dunn v. United States*, 307 F.2d 833 (C.A. 5, 1962) which held (p. 886):

> "The paths of justice must be cut through a wilderness of facts in every case. * * * We are always concerned with guilt and innocence in criminal cases; but of equal importance is a fair trial to guilty and innocent alike. Trials are rarely, if ever, perfect, but gross imperfections should not go unnoticed. * * * It is better to follow the rules than to try to undo what has been done. Otherwise stated, one 'cannot unring a bell'; 'after the thrust of the saber it is difficult to say forget the wound'; and finally, 'if you throw a skunk into the jury box, you can't instruct the jury not to smell it.'"

In *McFarland v. United States*, 150 F.2d 593 (C.A.-D.C. 1945) the Court of Appeals said (p. 594):

> "The victim's bloodstained underclothes were not only shown to the jury but kept conspicuously displayed for several hours."

This and other prosecution conduct (p. 594) "deprived appellant of a fair trial."

the charge that 75,000 shares of stock of Fifth Avenue Industries and 75,000 shares of stock of General Holding Corporation transferred in a transaction authorized by De-Long, President of United, and approved by its general counsel Keith, had no value (Pet. 8, R. 4). Petitioner further pointed out stock market values of unlisted stocks are shown on broker's "pink sheets." These pink sheets if produced in evidence would have shown that these shares had a "bid price of $3.00 per share" (Br. 10, R. 170-171). Respondent admits this fact (Br. 10). Notwithstanding this admitted value, Respondent now argues "this value was disputed" (Br. 10). Respondent placed on the Government's hearsay summaries no value for these stocks and then showed on the summaries that United was defrauded of $639,000 (Br. 3).

Canon 5 of Professional Ethics requires prosecutors "to see that justice is done" and the "suppression of facts * * * capable of establishing innocence * * * is highly reprehensible" (Pet. 9). Actually, the pink sheets show higher values up to $3.75 or more per share near dates when the shares were acquired by United. When we multiply 150,000 shares of stock by the value shown at the time these shares of stock were acquired by United by $3.00 per share, as shown on the pink sheets, these stocks at that time had a minimum value according to the market of $450,000.00. When we multiply these 150,000 shares of stock by the demand price of $3.75 per share, as shown on the pink sheets, these stocks at that time had a demand value according to the market of $562,500.00.

Under Canon 5 it was the primary duty of Respondent to place these pink sheets in evidence as tending to establish "the innocence of the accused" and to place these values on summary sheets measuring three and one-half by five and one-half feet if "justice is to be done". Evidence after the fact that much later United's efforts to sell the stock were unsuccessful was inadmissible. Thus, in 1968 stocks on the market reached the Dow Jones 980 mark. Such stocks thus valued and used as collateral or acquired at that time cannot eighteen months later be devalued by

a person seeking to acquire or sell those stocks when they have declined down to a Dow Jones average of 744. This was the technique used by Respondent in the trial below. Yet Respondent argued to the jury and persuaded it to convict Petitioner on the theory that stocks acquired by United having a high value of $562,500.00, according to the pink sheet market reports, had *no value* because they could not be sold "later."

5. Respondent argues the fact that the jurors read a newspaper which was found in the jury room which contained prejudicial material reporting on the results of the trial involving the conviction of the prosecution witness Gaskin under the same indictment, and the suicide of DeLong, should be disregarded because none of the jurors admitted having read the newspaper article and it was "an accurate account of the trial." The reading of this article with the report of the suicide of DeLong and the conviction of Gaskin on the same charges prejudiced Petitioner. No admonitions of the Court to the jury could cure this prejudice.

> *United States v. Accardo*, 298 F.2d 133, 136 (C.A. 7, 1962);
>
> *Janko v. United States*, 366 U.S. 716, 81 S. Ct. 1662 (1961).

In *Janko*, Respondent urged reversal, stating:

> "The Court of Appeals concluded that the publication of this article did not deprive petitioner of a fair trial because (a) the trial court had repeatedly warned the jurors against the reading of any such articles and (b) petitioner's counsel had rejected the opportunity of questioning the jurors directly as to whether any of them had read the article in question.
>
> * * *
>
> In the light of the character of the extraneous information contained in the article, we think that, before the jury was finally discharged, the trial court should have assured itself as to whether the jurors

had in fact read the article. Counsel's reluctance to have the jury questioned during the trial may be understandable. (Briggs v. United States, 221 F.2d 636, 639 (C.A. 6); Krogman v. United States, Supra, 228-229)." (Reported only at 61-2 USTC Para. 9615).

6. Respondent argues our first contention that Rule 18 of the court below is unconstitutional and is contrary to the Federal Rules of Appellate Procedure of this Court *last* (Br. 11). Our argument (Pet. 6-8) is answered by Respondent in two sentences. Respondent argues summary, secret, in chamber, closed and without oral argument proceedings on appeal contrary to the Federal Rules of Appellate Procedure do "not deprive an appellant of his right to due process or representation by counsel" (Br. 11). No authorities are cited by Respondent to support this bold statement. Instead, Respondent suggests that this Court should search its records and read Respondent's brief in *Ambers v. United States*, No. 799, (certiorari denied, January 19, 1970), implying this denial of certiorari is persuasive here as the issue of the validity of Rule 18 was "raised" in *Ambers*. Respondent Ambers' Brief was not filed with the Court herein nor served on Petitioner's counsel. This required counsel to obtain a copy of the Ambers Brief from the Clerk of this Court, subject to return. We submit, if Respondent's argument in opposition is worthy of consideration by this Court, at the very least it should appear in Respondent's Brief in this proceeding. The Solicitor General's suggestion that the Justices of this Court and Petitioner's counsel should search out an earlier argument in a Brief in another case *not decided* by this Court on the merits is presumptuous and should be disregarded.

Nevertheless, we have read Respondent's Brief (pp. 7-8) in *Ambers*. We first submit that the denial of the writ in *Ambers* was no expression by this Court on the merits and this Court has so held.[3] Turning to the merits, Respond-

[3]This Court has frequently reiterated that "the denial of a writ of certiorari imports no expression of opinion on the merits of the case

ent, except for a decision of the court below (Br. 7) in upholding its own summary Rule 18, cites only two cases, namely; *Price v. Johnson*, 334 U.S. 266, 286 (1948) and *Brown v. Allen*, 344 U.S. 443, 486, n. 36 (1952). *Price* and *Brown* are not in point. Neither holds oral argument on the *first* appellate review of a District Court conviction of crime can be eliminated by a Federal Court of Appeals and appeals can be decided in chambers in a summary manner. Both *Price* and *Brown* were decided many years prior to the adoption by this Court in 1969 of the Federal Rules of Appellate Procedure, requiring oral argument unless waived by consent of the parties.

Price discusses the discretionary power of a Court of Appeals to permit and impose restrictions on oral argument of a prisoner, among other purposes, to secure the court from danger. *Price* involved a fourth application for a writ of habeas corpus. Price was brought before the Court of Appeals *and conducted his oral argument.* A rehearing was assigned by the court *en banc.* Against this background this Court held the Court of Appeals had discretion and power to command a prisoner to be brought before it and may allow him to argue his own appeal. In *Ambers*, this Court made the statement quoted by Respondent (Br. 7) from page 286 of the opinion. Such a quotation out of context is not controlling or persuasive on the question posed in our Petition, pp. 8-12.

Brown does not deal with Federal Appellate procedure but with procedure under North Carolina law. Note 36, p. 487, cited by Respondent is a footnote discussion of appellate practices under North Carolina law where a convicted criminal files an "out-of-time review". *Brown* is not applicable here, and in any event this Court has held, con-

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as the bar has been told many times." *United States v. Carver*, 260 U.S. 482, 490; *Brown v. Allen*, 344 U.S. 443, 451-452, 491-492; *Sunal v. Large*, 332 U.S. 174, 181; *House v. Mayo*, 324 U.S. 42, 48; *Atlantic Coast Line R. Co. v. Powe*, 283 U.S. 401, 403; *Ohio ex rel Seney v. Swift & Co.*, 260 U.S. 146, 151; *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 and *Ohio ex rel. Eaton v. Price*, 360 U.S. 246, 247 (Brennan, J.).

trary to North Carolina law, in Federal Criminal proceedings, an appeal is "*a matter of right.*"

Rodriquez v. United States, 89 S.Ct. 1715, 1717 (June 2, 1969);

Coppedge v. United States, 369 U.S. 438, 441, 82 S.Ct. 917, 919 (1962).

To permit Rule 18 of the Court below to stand and to permit summary, secret and in chamber dispositions of appeals without oral argument not only is contrary to Rules 2, 3, 34 and 47 of the Federal Rules of Appellate Procedure, effective July 1, 1968, but would authorize "Star Chamber" trials barred in England since the Magna Carta (1641) and by the V and VI Amendments to the Constitution (1791). Rule 18 also bars a public hearing. We submit that what this Court said in voiding a Michigan criminal proceeding because it was conducted in a judge's chambers in secret, is applicable to and condemns Rule 18, because it authorizes in chambers a non-public summary proceeding barring argument in a criminal appeal.

In *In Re Oliver,* 333 U.S. 257, 266-270, 278; 68 S.Ct. 499, 504-506, 510, this Court held:

> "This nation's accepted practice of guaranteeing a public trial to an accused has its roots in our English common law heritage. The exact date of its origin is obscure, but it likely evolved long before the settlement of our land as an accompaniment of the ancient institution of jury trial. In this country the guarantee to an accused of the right to a public trial first appeared in a state constitution in 1776. Following the ratification in 1791 of the Federal Constitution's Sixth Amendment, which commands that 'in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial * * * ' most of the original states and those subsequently admitted to the Union adopted similar constitutional provisions. Today almost without exception every state by constitution, statute, or judicial decision, requires that all criminal trials be open to the public.

> The traditional Anglo-American distrust for secret trials has been variously ascribed to the notorious use of this practice by the Spanish Inquisition, to the excesses of the English Court of Star Chamber, and to the French monarchy's abuse of the *lettre de cachet.* All of these institutions obviously symbolized a menace to liberty. In the hands of despotic groups each of them had become an instrument for the suppression of political and religious heresies in ruthless disregard of the right of an accused to a fair trial. Whatever other benefits the guarantee to an accused that his trial be conducted in public may confer upon our society, the guarantee has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution."
>
> * * *
>
> It is 'the law of the land' that no man's life, liberty or property be forfeited as a punishment until there has been a charge fairly made and fairly tried in a public tribunal. See Chambers v. Florida, 309 U.S. 227, 236, 237, 60 S.Ct. 472, 477, 84 L.Ed. 716."

Petitioner under the law is entitled to his day in open court, including oral argument, "on the merits" in "the court first charged with the supervision of the trial court."

Coppende v. United States, supra, p. 453, p. 925.

CONCLUSION

Petitioner submits and again prays that his Petition for a Writ of Certiorari be granted and the decision below reversed.

Respectfully submitted,

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PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioner prays that this Honorable Court grant a rehearing of its Order of February 24, 1970 denying the Petition for a Writ of Certiorari and that a Writ of Certiorari issue reversing the decision and judgment below of the United States Court of Appeals for the Fifth Circuit.

BRIEF AND DISTINCT STATEMENT OF GROUNDS

Substantial grounds available to Petitioner have not been previously presented fully and other circumstances have occurred which warrant the filing of this Petition for Rehearing under Rule 58 of this Court.

Several recent decisions of this Court which have not been discussed in the Petition for Writ of Certiorari or in the Reply Brief have been decided by this Court which support Petitioner's contention that Rule 18 of the court below providing for a summary disposition of appeals without argument should be reviewed. In *Commonwealth Coat Corp. v. Continental Gas Co.*, 393 U.S. 145, 89 S. Ct. 337 (1968), this Court held (pp. 150, 340) "Any tribunal * * * permitted to try cases and controversies * * * not only must be unbiased but also must avoid even the appearance of bias" reaffirming *Tumey v. State of Ohio*, 273 U.S. 510, 47 S. Ct. 437 (1927).

In *Commonwealth* and *Tumey* this Court stated both the Constitution and statutory requirements provide that all trials must be "impartial." In reversing a summary proceeding finding an attorney guilty of contempt, this principle was enunciated in *Offutt v. United States*, 348 U.S. 11, 14, 75 S. Ct. 11, 13, wherein this Court held in reversing such summary proceeding that it did not "satisfy the appearance of justice."

Private, in chambers, and summary disposition of criminal appeals which are matters of right in the Court of Appeals, wherein there should be a hearing on the merits in the court first charged with conducting a hearing on the merits of the trial, is a denial of due process of law, is unfair, and does not "satisfy" and destroys all "appearance of justice."

Petitioner set forth in his Petition that Rule 18 (App. B, p. B4) of the court below, permitting summary proceedings without oral argument, is unconstitutional and is contrary

to the Federal Rules of Appellate Procedure of this Court, particularly Appellate Rules 2, 3, 34 and 47 (pp. 6-8). (App. B, pp., B3, 4). Rule 34 of the Appellate Rules of this Court requires oral argument, sets a time for oral argument and provides that oral argument can be dispensed with only "by agreement of the parties," and even when such an agreement is reached a Court of Appeals "may direct that the case may be argued." The summary provisions of Rule 18 providing for sua sponte in chambers and summary dispositions of appeals in criminal cases without oral argument is in direct conflict with Appellate Rules 34 and 47 of this Court.

Petitioner pointed out in his Petition (pp. 6-8) and in his Reply Brief (pp. 8-11) that Rule 18 provides for the type of summary proceeding characterized by this Court as a Star Chamber proceeding in England, and such a summary proceeding in Chambers is unconstitutional and illegal because it deprives the citizen of his liberty without the charge being fairly made and fairly tried in a public tribunal, citing *In Re Oliver*, 333 U.S. 257, 266-270, 278; 68 S. Ct. 499, 504-506, 510 and *Chambers v. Florida*, 309 U.S. 227, 236, 237, 60 S. Ct. 472, 477.

In *Rodriquez v. United States*, 395 U.S. 327, 89 S. Ct. 1715 (1969) this Court set aside the requirement of the Ninth Circuit that before indigent appellants could go forward with an appeal, such appellants would have to "show some likelihood of success on appeal" and its holding that failing to show such likelihood the "denial of the right of appeal as a species of harmless error" stating (pp. 329-330, 1717):

> "As this Court has noted before, 'present federal law has made an appeal from a District Court's judgment of conviction in a criminal case what is, in effect, a matter of right.' *Coppedge v. United States*, 369 U.S. 438, 441, 82 S. Ct. 917, 919, 8 L. Ed. 2d 21 (1962). The Ninth Circuit seems to require an applicant under 28 U.S.C. Sec. 2255 to show more

> than a simple deprivation of this right before relief can be accorded. It also requires him to show some likelihood of success on appeal; if the applicant is unlikely to succeed, the Ninth Circuit would characterize any denial of the right to appeal as a species of harmless error. We cannot subscribe to this approach."

This Court further held (pp. 332, 1718) that the applications of these holdings of the Ninth Circuit "effectively deprive petitioner of his right to appeal."

Rule 18 in providing for summary disposition in chambers, without oral argument and participation by counsel should not be permitted to stand, as it effectively denied Petitioner of a fair and public hearing on his appeal in "the Court first charged with the supervision of the trial court." *Coppedge v. United States,* 369 U.S. 438, 441, 453, 82 S. Ct. 917, 919, 925 (1962).

Rule 18 effectively bars an open and public appeal, contrary to Appellate Rule 34 of this Court. Rule 18, therefore, conflicts with the ruling in *Liles v. South Carolina Department of Corrections,* 414 F.2d 612 (C.A. 4, 1969) because it denies Petitioner the type of hearing on appeal now provided by statute and by the Federal Rules of Appellate Procedure. Thus, the Court of Appeals in *Liles* in reversing the district court and in granting an appeal in forma pauperis, held (p. 614):

> "Neither by the statutes of the United States nor the Federal Rules of Appellate Procedure is the district court given the power to deny review by this court of a case in which an appeal as of right is assured.
>
> * * *
>
> This will insure that the right of appeal will not be lost or denied because of a prisoner's indigence or his ignorance of proper appellate procedures."

The summary disposition without oral argument of Petitioner's appeal in Chambers and without an oral argument

seems a step backward and into the type of "Star Chamber" proceedings condemned by the Magna Carta (1641), the Fifth and Sixth Amendments to the Constitution (1791), Appellate Rule 34 of this Court and by this Court. This Court should exercise its power of supervision and correction, should review Rule 18 of the court below and hold Rule 18 to be unconstitutional and contrary to law as applied in Petitioner's case. Rule 18 constitutes such a departure from the recognized and proper conduct of appeals in Federal Courts as to call for the exercise of this Court's powers of supervision and correction.

CONCLUSION AND PRAYER

Petitioner prays that this Honorable Court grant this Petition for Rehearing, and, on rehearing, issue a Writ of Certiorari reversing the judgment below.

Respectfully submitted.

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CERTIFICATE OF COUNSEL

I hereby certify that this Petition for Rehearing is presented in good faith and not for delay.

Warren E. Magee
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Dated March 17, 1970